Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

CLAUDE J. LUSSIER,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Appeal from the Appellate Division,
Third Department, of the Supreme
Court of the State of New York

Petition for Writ of Certiorari

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Questions Presented

Does the due process clause of the Fourteenth Amendment of the United States Constitution prohibit the State from withholding material evidence which might result in acquittal until the evidence can no longer be used to assist the defense? (In other words, where the prosecution intentionally or inadvertently withholds evidence from the defense which might be exculpatory until the trial is under way and the witness who would give material evidence is no longer in the jurisdiction of the Court, subject to subpoena, is this a denial of due process or is the conviction and sentence subsequent thereto a deprivation of liberty without due process of law?)

List of All Parties to the Proceeding in the Court Whose Judgment is Sought to be Reviewed.

The names of all of the parties to the proceeding in the Court whose Judgment is sought to be reviewed appear in the caption of the case.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

- X

CLAUDE J. LUSSIER,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

- X

PETITION FOR WRIT OF CERTIORARI

Official and Unofficial Reports of Opinions Delivered in the Case by Other Courts or Administrative Agencies.

Defendant was convicted after Jury Trial of one Count of Sodomy First Degree, one Count of Sodomy Third Degree, six Counts of Sexual Abuse First Degree, six Counts of Sexual Abuse Third Degree, and one Count of Endangering the Welfare of a Child. The decision was affirmed by

the Appellate Division, Third Judicial Department. An application was made to the New York State Court of Appeals for permission to appeal and this Application was denied on July 27, 1994.

Statement of the Grounds on Which the Jurisdiction of this Court is Invoked.

(i) Decision of the Appellate Division, Third Judicial Department dated June 16, 1994.

(ii) Not Applicable.

(iii) Not Applicable.

(iv) The statutory provision believed to confer jurisdiction on this Court is Title 28 U.S. Code §1257(a); Elks National Foundation v. Weber (1991), Ca. 9 Mont. 942 F2d 1480; Mississippi Power and Light Co. v. Mississippi, et rel., 487 U.S. 354, 101 L.Ed.2d 322.

The Decision and Order sought to be

reviewed is that of the Appellate Division of the New York State Supreme Court, Third Judicial Department, dated June 16, 1994.

Constitutional Provisions, Treaties Statutes, Ordinances and Regulations Involved.

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. Citizen of the United States.
>
> "All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 240 of the Criminal Procedure Law

Section 240.45

"1. After the Jury has been sworn and before the prosecutor's opening address, or in the case of a single judge trial after commencement and before submission of evidence, the prosecutor shall, subject to a protective order, make available to the defendant:

"(a) Any written or recorded statement, including any testimony before a grand jury and an examination videotaped pursuant to section 190.32 of this chapter, made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's

testimony; (Chgd. by L.1984, chap. 804(5), eff. 11/1/84)

"(b) A record of judgment of conviction of a witness the people intend to call at trial if the record of conviction is known by the prosecution to exist;

"(c) The existence of any pending criminal action against a witness the people intend to call at trial, if the pending criminal action is known by the prosecutor to exist.

"The provisions of paragraphs (b) and (c) of this subdivision shall not be construed to require the prosecutor to fingerprint a witness or otherwise cause the division of criminal justice services or other law enforcement agency or court to issue a report concerning a witness."

Statement of the Case

Petitioner was convicted, after jury trial in the County Court of Clinton County on July 21, 1993 of one Count of Sodomy First Degree, one Count of Sodomy Third Degree, six Counts of Sexual Abuse First Degree, six Counts of Sexual Abuse Third Degree, and one Count of Endangering the Welfare of a child and sentenced to an indeterminate term of seven to twenty-one years.

Petitioner appealed to the Appellate Division, Third Judicial Department and his sentence, in effect, was cut to five to fifteen years. Thereafter, Petitioner applied to the New York State Court of Appeals for permission to appeal and this application was denied.

Throughout the appellate process Petitioner contended that contrary to

Brady v. Maryland, potential exculpatory testimony was withheld by the prosecution until after the witness moved to another state and the trial had commenced and it was impossible for the defense to bring the witness to testify.

The exculpatory evidence is in two parts. The first part is a report of a physician, Brent W. Spears, M.D., indicating essentially that there was no physical evidence that would substantiate the crime. Dr. Spears had examined the victim in July and August of 1991 and discovered no physical evidence of the offense. The District Attorney did not call this witness, but called another medical witness, Dr. Maureen Fleming, who examined the victim at a later date and discovered evidence of sexual assault. Dr. Spears examined the victim directly

after the commission of the alleged crime, and during the time of the alleged crime. Dr. Fleming examined the victim some time after the crimes and opined that there was medical evidence supporting the crimes.

At the commencement of trial, the District Attorney indicated she was not calling Dr. Spears, but was Calling Dr. Fleming. On the second day of trial, the District Attorney produced a General 84 (a New York State Police Bureau of Criminal Investigations report) indicating that Brent W. Spears, M.D. had been interviewed and he told the investigator for the Bureau of Criminal Invesitgations that he found no evidence of physical abuse and was not surprised, due to the lapse of time. By this time, Dr. Spears had moved to Texas and refused

a telephonic request made during trial to return.

Petitioner contends that Dr. Spears potential testimony would have been exculpatory and would have created a reasonable doubt as to the reliability of the prosecution's case, through direct examination or Cross Examination.

The Respondent must have known that Dr. Spears' testimony would be important, since they had the Bureau of Criminal Investigations report and did not turn it over to the defense. Dr. Spear's unavailability deprived the defendant of a fair trial.

The delay in providing the Bureau of Criminal Investigaiton report so that the exculpatory evidence of the potential testimony of Dr. Spears reinforced by the State Police evidence was lost to the

defense because Dr. Spears had moved to Texas.

The District Attorney's submission to the Court in March of 1993, months before the trial commenced she stated there was no exculpatory evidence, and the later revelation of the exculpatory testimony at a time when the same could not be used effectively by the defense, amounted to a denial of the due process of law.

This is Review of a State Court Judgment.

The same federal questions that are raised here were raised in the County Court of Clinton County, in the Appellate Division, Third Judicial Department and in the Application to the New York State Court of Appeals for permission to appeal. This question was raised in all the previous submissions to the New York

State Courts.

See Appendix

Argument Amplifying the Reasons Relied on for Allowance of the Writ.

New York State's Discovery Statute, Article 240 of the Criminal Procedure Law is woefully inadequate in that prior testimony of witnesses who are called to testify, their statements, and grand jury testimony are not available to the defense until after the jury has been selected and sworn. A trial is not a jousting contest. In order to maintain an even playing field in the search for the truth, any exculpatory evidence should be promptly turned over to the defense. This would facilitate swifter movement in the litigation, since both

sides would be aware of all of the facts.

Permitting the prosecution to withhold exculpatory evidence by the device of not electing to call a witness past the point where the defense could effectively set forth the evidence by calling a witness subject to subpoena, does not serve the judicial system.

The Federal system and the system employed in the more enlightened jurisdiction of California, wherein the prosecution's evidence is an open book for the defense, is eminently more fair than the New York system.

The defendant could not have known that Dr. Spears was not to be called by the prosecution.

Dr. Spears' testimony, bolstered by the New York State Police Bureau of Criminal Investigations report, might

have created reasonable doubt.

Respectfully Submitted,

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APPENDIX.

Court of Appeals Certificate Denying Leave, July 27, 1994

STATE OF NEW YORK

Court of Appeals

BEFORE: HON. GEORGE BUNDY SMITH,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

CLAUDE J. LUSSIER,

Appellant.

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is

no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
July 27, 1994

George Bundy Smith
Associate Judge

*Order of the Appellate Division, Third Department, entered June 16, 1994, affirming a judgment of the County Court, Clinton County, rendered June 21, 1993.

Appellate Division Memorandum and Order
June 16, 1994

SUPREME COURT--APPELLATE DIVISION
Third Judicial Department

Decided and Entered: June 16, 1994

69887

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

CLAUDE J. LUSSIER,

Appellant.

Calendar Date: April 26, 1994

Before: Cardona, P.J., Mikoll, White, Weiss and Peters, JJ.

O'Connell, Wolfe & O'Connell (J. Byron O'Connell of counsel), Plattsburgh, for appellant.

Penelope D. Clute, District Attorney, Plattsburgh, for respondent.

Peters, J.

Appeal from a judgment of the County

Court of Clinton County (Nicandri, J.), rendered June 21, 1993, upon a verdict convicting defendant of the crimes of sodomy in the first degree, sodomy in the third degree, sexual abuse in the first degree (six counts), sexual abuse in the third degree (six counts) and endangering the welfare of a child.

Defendant was convicted of sodomizing a young boy who began working as a farmhand on a farm owned by defendant's family in Clinton County during the 1990-1991 school year. The victim worked there both after school and on weekends during the school year and during the summer recess. After his return from a summer vacation with his family, he complained to his sister after one day back on the job that defendant had sexually abused him. The victim was

thereafter examined by two physicians. The first examination failed to reveal any evidence of sexual abuse, but the second examination by a doctor experienced in the subject area found a scar near the victim's anus consistent with his statement that defendant had attempted anal sodomy on him.

Defendant claims, inter alia, that the victim's testimony is "incredible" and should be rejected by this court. While we are certainly empowered to reverse a conviction if we find that the testimony of the victim involved "hopeless contradictions", where, as here, a youthful witness explains his contradictory testimony along with the reasons why he failed to promptly inform the jury, as the trier of fact, is free to accept or reject the explanation

offered (see, People v De Tore, 34 NY2d 199, cert denied 419 US 1025).

Defendant further contends that his conviction must be reversed and the indictment dismissed because of the failure of the People to timely provide a copy of the State Police investigative report which included notes of an interview with the doctor who found no evidence of sexual abuse -- material required to be disclosed pursuant to Brady v. Maryland (373 US 83). Defendant contends that by the time he learned of such material, he was unable to secure the testimony of such doctor and therefore his rights to a speedy and fair trial were irreparably affected (see, People v Taranovich 37 NY2d 442). Even assuming that a Brady violation had occurred at trial, it is well settled

that the failure to timely produce Brady Material will not require a mistrial or dismissal if a less drastic remedy can cure the prejudice caused by the violation (see, People v Kelly, 62 NY2d 516). Here, County Court imposed an appropriate sanction to remedy the potential prejudice and such sanction was agreed to by counsel for defendant.

Addressing next defendant's contention that County Court erred in its refusal to permit into evidence a psychological evaluation of the victim prepared by the victim's school psychologist, we find that the court correctly determined that defendant failed to sustain his burden of showing a factual predicate that the record could establish the unreliability of the victim or provide a motive to falsify (see,

People v Gisendanner, 48 NY2d 543; People v Tissois, 131 AD2d 612, affd 72 NY2d 75). Having simply raised an issue as to the victim's general credibility, we find that County Court appropriately refused to admit the confidential report into evidence.

As to defendant's contention that County Court erred in allowing the victim's sister to testify to hearsay statements made by the victim when he stated that he did not want to go back to work because defendant had tried to "penetrate" him, we find that, whether we consider the victim's statements to his sister to be a prompt outcry (see, People v McDaniel, 81 NY2d 10) because her was allegedly sexually assaulted by defendant the day prior to this disclosure or a delayed outcry adequately explained (see,

People v O'Sullivan, 104 NY 481; People v Kornowski, 178 AD2d 984; People v Smyer, 167 AD2d 773, lv denied 77 NY2d 967), we find County Court's ruling to be correct.

Finally, as to defendant's contention that County Court erred in sentencing him consecutively after his conviction of sodomy and sexual abuse in the first degree because the two crimes occurred at the same place and time and arose our of a single criminal transaction (see, Penal Law §70.25 [2]), we find that defendant correctly notes that the victim's penis and the placing of his penis in defendant's mouth as one continuous act. We therefore modify such sentences to run concurrently (see, People v Brathwaite, 63 NY2d 839; People v Rodriguez, 168 AD2d 520, lv denied 78 NY2d 926; People v Hatch, 105 AD2d 549).

As to defendant's remaining contentions we find them to be lacking in merit.

Cardona, P.J., Mikoll, White and Weiss, JJ., concur.

ORDERED, that the judgment is modified, on the law and the facts, by reversing so much thereof as directed that the sentences imposed on the seventeenth and nineteenth count of the indictment be served consecutively; said sentences to run concurrently with each other; and, as so modified, affirmed.

ENTER:

Michael J. Novack
Clerk

Sentencing

THE COURT: Thank you Mr. Lussier. It is the judgment of this Court that the Defendant, Claude J. Lussier, for his conviction of Sodomy in the First Degree as a Class B violent Felony be sentenced to an indeterminate term having a maximum of fifteen years and a minimum of five years. For his conviction of Sodomy in the Third Degree his is sentenced to an indeterminate term having a maximum of four and a minimum of one and one third years and those two sentences to me served concurrent with one another. It is the judgment of this Court that the Defendant, Claude J. Lussier, for the first three convictions of Sexual Abuse in the First Degree, a Class D Violent Felony, be sentenced to an indeterminate term having a maximum of six years and a

minimum of two years and that those sentences to run consecutively to the sentence for Sodomy. The second three convictions of Sexual Abuse in the Third Degree, the Defendant be sentenced to an indeterminate term having a maximum of six years and a minimum of two years and that those sentences to run concurrently with the first three sentences for Sexual Abuse in the First Degree. It is the judgment of this Court for the conviction of Sexual Abuse in the Third Degree, the Defendant be sentenced to a maximum of ninety days and that sentence is to run concurrently with the previous sentences and for the conviction of Endangering the Welfare of a Child, the Defendant is sentenced to a maximum of one year and that is to run concurrently with the previous sentences. Mr. Lussier, as I

compile that means you are sentenced to a maximum of twenty-one years and a minimum of seven years and some of this is consecutive and some is concurrent and that is the bottom line. Mr. Lussier, these cases, sex offender cases, all have to do with credibility issues and they deal with issues because they don't take place in public. They take place in private and the credibility issue in this case was based upon the defense that there was no opportunity for any of these things to take place. When I was much younger I worked on a farm for a period of time and I married a girl who was born and grew up on a farm and while her parents were alive, we spent a great deal of time on the farm. So I know it is very easy to get lost on a farm if you have any inclination to do so and from my

own personal standpoint it just strikes me as incredible that everyone would always be around all of the time. So if anyone had any inclination to be somewhere alone and could not find the opportunity to do so on the farm, it just strikes me as being incredible and it strikes me that that is what the jury found as well and it is a credibility issue and I think that the evidence supports the jury's verdict. Therefore I am denying the Motion to set aside the verdict and I also am denying the request for a stay pending perfecting of the appeal. Having denied the request for stay, I am also denying the request to fix bail pending an appeal. So therefore I am remanding you to the Department of Corrections in Dannemora there to be dealt with in accordance with the terms pertaining to your sentence.

Report of Dr. Brent W. Spears

S: A 14 y/o w male involved in possible sexual abuse one month ago. Young man who has worked on farm for approx. 1 yr.--refused to RTW on 8/6/91--alleged forced sexual contact with approx. 21 y.o male began approx. 1 mo. previously, incl. rectal ic, approx. 17 July 91. Pt reports rectal or urethral dic no sore on penis. Oragenital contact alleged on 20-30 occasions. No other participants alleged--family intends to pursue the matter to full extent of law--pt feels 7/18 visit was not due to S/A--rather, he feels it is due to chafing of underwear. Articulate young man--Father MEENT fewer. Heart bys clear. Aldo unteiden. Tanner straps 2-3. Hypospadias present. No open lesions. No adenopathy. Rectum--? of small superf

fissure @ 4 o'clock--No lesions.

A--alleged sexual abuse

P--GC, chlan cults of urethra, rectum

RPR will follow

BWS

New York State Police
Continuation Sheet

Troop B

Chazy Station

Zwart, Michael Adam Case No. 91-268

1. On 8/12/91 Michael A. Zwart (C/S-1) entered the New York State Police Station in Chazy, New York accompanied by his father DIRK P. ZWART (1/8/50) and reported that he was the victim of a sexual assault by an individual identified as CLAUDE J. LUSSIER (T-1). ZWART stated that he was employed at the LUSSIER farm on a part-time basis and that he had been working on the farm with CLAUDE LUSSIER and ARMAND LUSSIER for approximately 1 year. ZWART said that on or about the latter part of June 1991 CLAUDE began to fondle MZWART'S penis and that eventually he placed ZWART'S penis into his (CLAUDE) mouth. ZWART went on

to say that this particular act occurred approximately 20 or 30 times over the course of the past several months. ZWART also said that sometime during the first or second wee of July that LUSSIER pulled his (ZWART) pants down and had anal intercourse with ZWART. ZWART stated that he and his parents went on vacation after this incident and that upon their return his father inquired as to why ZWART had not returned to work on the LUSSIER farm and upon further conversation he told his father DIRK about these incidents. His father then reported it to the State Police. At the conclusion of this interview it was suggested that MICHAEL ZWART be examined by a physician to determine if any medical or physical evidence existed which would corroborate ZWART's

allegations.

2. On 8/12/91 DIRK P. ZWART, MICHAEL'S father advised that he had taken MICHAEL to the Plattsburgh Air Force Base hospital and a physical examination was performed by DR. BRENT SPEAR. ZWART said that he had given SPEAR authorization to reveal the results of that exam to the New York State Police.

3. On 8/13/91 DR. BRENT SPEAR was contacted relative to the medical examination of MICHAEL ZWART (C/S-1). SPEAR said that the medical exam of MICHAEL failed to detect any physical evidence of the alleged sexual assault. SPEAR went on to say that due to the time lapse between the alleged incident and the examination he was not surprised that no physical evidence existed. SPEAR

stated that he had advised the ZWARTS of the results of the exam.

4. On 8/13/91 CLAUDE J. LUSSER (T-1) was interviewed relative to the allegations made by MICHAEL ZWART (C-1). LUSSIER vehemently denied all of the allegations and further stated that MICHAEL had fabricated all of these facts. LUSSIER went on to say that he was not going to answer any further questions concerning these allegations until he sought the advice of an attorney.